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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSA ISELA LIZARRAGA,

Defendant and Appellant.

G045543

(Super. Ct. No. 08CF0225)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Rosa Isela Lizarraga of attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a))¹ and two counts of aggravated assault (§ 245, subd. (a)(1)). Defendant admitted she stabbed the victim twice, but asserted her actions were taken in self-defense. She claims on appeal that the trial court prejudicially erred by allowing the prosecutor to introduce evidence of a prior incident in which defendant stabbed a different individual. Defendant further asserts the court erred by refusing to allow her to present evidence that she was not charged with a crime as a result of the prior incident. Although we agree with the latter contention, we conclude the court's error was not prejudicial and therefore affirm the judgment.

FACTS

The operative information accused defendant of: one count of commercial burglary (§§ 459, 460, subd. (b)); one count of attempted murder (§§ 187, subd. (a), 664, subd. (a)); and two counts of aggravated assault (§ 245, subd. (a)(1)). Enhancements were also alleged, namely personal use of a deadly weapon enhancement (§ 12022, subd. (b)(1)) as to the attempted murder count and a great bodily injury enhancement (§ 12022.7, subd. (a)) as to the attempted murder and one of the aggravated assault counts. The court dismissed the commercial burglary count at the request of the People. The jury convicted defendant of each of the remaining counts and found the enhancements to be true. The court sentenced defendant to 14 years to life in prison.

Because the resolution of this appeal depends upon whether the court committed prejudicial error, we set forth in detail the pertinent evidence presented to the jury. By the time the case was submitted to the jury, the central issue was defendant's

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All statutory references are to the Penal Code, unless stated otherwise.

intent. As defense counsel stated in closing argument, defendant “used a knife and caused those wounds” to victim Lucas Gonzalez.

Testimony of Lucas Gonzalez

During late 2007 and early 2008, Lucas Gonzalez worked at a coin operated laundry in Santa Ana, California. On November 17, 2007, Gonzalez encountered defendant at the laundry. Defendant was hitting coin machines and loitering in Gonzalez’s office; Gonzalez told her she had to leave his office. Defendant departed, but Gonzalez followed her because his cell phone was missing from his office. Gonzalez asked defendant to return his cell phone, but defendant instead pulled out a pocket knife and insulted Gonzalez. Defendant pointed the knife at Gonzalez’s chest. Gonzalez called the police and defendant quit the premises.

On January 9, 2008, Gonzalez again encountered defendant at the laundry. Gonzalez was “outside of the laundry. I was talking with a person when I see her. I had put away my coins, about 25 cents in the bag, and she threw it on my feet and she told me call the police if you wish.” Defendant was approximately five feet away from Gonzalez. Gonzalez started to call the police on his cell phone when he “felt something” hit him on his heart. It felt painful. Gonzalez continued to try to contact the police. Defendant sustained her attack by hitting Gonzalez on his face with one hand; Gonzalez does not remember ever seeing a knife. Gonzalez does not remember using a plastic sign to try to defend himself.

Testimony of Jimmy Ventura-Meza

Jimmy Ventura-Meza was present near the parking lot of the laundry on January 9, 2008, when there was an altercation between a man and woman. After the argument progressed, the woman retrieved an item from a truck. The female struck the male two or three times; Ventura-Meza did not see a knife at the time. The man defended

himself with a floor sign (one used by someone mopping to warn of a slippery floor). The man did not do anything to the female; “she asked him to give her” something. The female attacked the male first. Ventura-Meza did not recognize defendant as the female involved in the attack. But after being presented with his out-of-court identification of defendant’s photograph, Ventura-Meza recognized defendant as the same person he had identified earlier.

A police officer testified that Ventura-Meza stated in an interview that he did see the female holding a knife in her hand and he saw the female stab the male with the knife.

911 Call and Response

The prosecutor played an audiotape of a 911 call from Gonzalez to the police. In the tape, Gonzalez communicated that a female stabbed him in his chest. The responding police officer testified that when he arrived “[i]t was pretty chaotic. I found [defendant lying] in the parking lot. He had been stabbed.” “When I first saw him, he was . . . in a fetal position [lying] down on the ground.” Police tracked defendant to Fresno, California, where she was arrested on January 18, 2008.

Evidentiary Stipulations

The parties stipulated to the following: (1) “That on January 9, 2008, Lucas Gonzalez was admitted to the ER at Western Medical Center”; (2) “Mr. Gonzalez had a 4 inch laceration caused by a knife slash that went from his left eye brow to the right side of his face”; (3) “Mr. Gonzalez also had a 1 to 2 inch deep knife wound to his chest which punctured his heart, causing his blood pressure to drop quickly”; (4) “The injury to Mr. Gonzalez’s heart caused bleeding within the lining which lowered his blood pressure”; (5) “The injury to Mr. Gonzalez’s heart was life threatening and required immediate surgery”; (6) “Dr. Humberto Sauri, M.D., performed surgery on Mr. Gonzalez

which lasted two hours[;] Dr. Sauri opened Mr. Gonzalez's chest, exposed his heart, and stitched the puncture wound"; (7) "Mr. Gonzalez was moved to the intensive care unit where he stayed for three days"; and (8) "Mr. Gonzalez was then moved to a general care room and was discharged from the hospital on January 14, 2008."

Testimony of Defendant Pertaining to Charged Crimes

With regard to the November 2007 incident, defendant testified that the coin machine malfunctioned and did not provide her with quarters after she had inserted money. Defendant looked for an employee to assist her. Eventually, defendant went inside the employee office to find someone to help her. Gonzalez approached and told defendant to get out of the office. A verbal confrontation ensued after Gonzalez threatened to call police. Defendant did not take Gonzalez's cell phone and did not go to the laundry to steal anything. Both individuals were angry and yelling at one another. Defendant never pulled out a knife. Defendant had a knife with her, but she did not use it. Defendant "probably" had the knife in her hand.

With regard to the January 2008 incident, defendant testified she was drinking with an unnamed individual. On her way to buy more beer, defendant saw Gonzalez and "remembered what he had done to me." Defendant and Gonzalez argued, defendant claiming Gonzalez owed her money. Defendant went inside the laundry, grabbed a container of money, and asked Gonzalez how it felt to have someone take away his money. Defendant threw the money at Gonzalez's feet and yelled at him to call the police. Defendant never took anything out of a truck. Gonzalez picked up the janitorial sign. Gonzalez hit defendant with the sign repeatedly. "And at that moment I look in my pocket and I pull out a knife." Defendant opened the knife. "So then as he's hitting me I cut him." Defendant was on the ground receiving additional blows when she cut Gonzalez's face. Defendant used the knife twice to defend herself. Defendant was not trying to kill Gonzalez but merely trying to fend off Gonzalez.

On cross-examination, defendant agreed she is the type of person to get angry quickly. She agreed she was angry with Gonzalez and felt like he had disrespected her. She admitted she told Gonzalez he did not know who he was messing with. She admitted she confronted Gonzalez first in the January 2008 stabbing incident.

Evidence of Uncharged Prior Stabbing Incident

Prior to trial, the prosecutor requested leave of the court to introduce evidence arising out of an incident that occurred on October 4, 2006 in Dinuba, California. The prosecutor submitted a file of documents to the court, which described an incident in which defendant stabbed a male in the chest and a female in the back. The male died and the female survived. Defendant claimed she acted in self-defense and the surviving female stated defendant instigated the confrontation.

The court found similarities between the prior incident and the conduct at issue in this case, and further found the prior incident was not remote in time. The court rejected defendant's argument that this was inadmissible character evidence: "One of the recognized [Evidence Code section 1101, subdivision (b)] theories of admissibility for a prior incident . . . is to challenge the claim of self-defense. I do know that the People are seeking to offer this evidence not in their [case in chief], but only if the defendant chooses to take the stand and testify, and then only if she were to claim self-defense in her testimony, and only to challenge the legitimacy of that assertion of self-defense with the prior matter." Pursuant to Evidence Code section 352, the court limited the prosecutor to using only evidence of the stabbing of the male victim, not the female victim. The court also precluded the prosecutor from offering evidence that the male victim died as a result of the stabbing.

Preempting the prosecutor, defendant testified during her direct examination that she was involved in an altercation on October 4, 2006. Defendant rode a bicycle to a friend's house. When she arrived, she observed a fight occurring. A man

who was punching her friend approached defendant and punched her. Defendant did nothing to provoke this attack. A woman began hitting defendant's head with a bottle. Notwithstanding the court's Evidence Code section 352 ruling, defendant admitted stabbing the woman who was attacking her to get the woman off of defendant. Defendant then stabbed the man after he pulled out a "weapon." Earlier in her testimony, defendant had attributed her practice of always carrying a knife to this October 2006 incident (she did not explain why she had a knife at the October 2006 incident).

Defendant was arrested by the police following the October 2006 incident. The court, on its own motion, stopped defense counsel from completing his next question, which pertained to whether defendant was ever charged with a crime in connection with the October 2006 incident. The court instructed the jury to disregard counsel's question. Outside the presence of the jury, defense counsel asked the court to allow testimony from defendant indicating she was not charged in the October 2006 incident. The court denied the request: "You are asking the witness to testify about an improper opinion of some deputy district attorney up in Fresno, whether there wasn't enough evidence in that case to prove it to a jury in Fresno beyond a reasonable doubt. It's completely irrelevant. It's an improper opinion, and even if it were a proper opinion, this isn't the way to get it in. So the fact that she wasn't charged is completely irrelevant."

Closing Argument

Defense counsel brought up the October 2006 incident in his closing argument, stating defendant "righteously used self-defense because she was getting whaled over the head It's also why she carries a knife every day after that happened" Defense counsel continued: "[The prosecutor] may argue . . . that is really some sort of circumstantial evidence of her intent or some circumstantial evidence that this wasn't self-defense, but [self-defense] actually . . . makes sense in this situation."

The prosecutor did not mention the October 2006 incident in his initial closing argument. In his rebuttal argument, the prosecutor stated: “[Defense counsel] talked about the stabbing that [defendant] was involved in 2006 . . . and said you have to see it from her point of view. She’s been involved in this before. Well, that’s true, she stabbed the other man in the chest three times And I think she stabbed the woman in the back to get her off her. But she is still going around getting in confrontations with people. She is still confronting other people with knives herself. It’s not like she is just holding the knife and being really cautious about who she gets involved with, what she sees, what she does. She is still in the world getting involved in conflict and not afraid to pull knives. She is provoking it especially on the 9th of January.”

DISCUSSION

We review evidentiary rulings under Evidence Code sections 1101 and 352 for an abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) “[A] trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.”” (*Id.*, at pp. 1328-1329.)

Admissibility of Evidence of Prior Incident

Defendant first contends the court erred by admitting evidence of the prior stabbing incident, which she claims could only serve to establish her propensity for violent crimes. “Except as otherwise provided by statute, all relevant evidence is admissible.” (Evid. Code, § 351.) Despite its relevance, “evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion[,]” is inadmissible. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*), superseded on other grounds by Evid. Code, § 1108; see also Evid. Code,

§ 1101, subd. (a).) But “[n]othing . . . prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).)

The court found a portion of the October 2006 incident to be admissible because of defendant’s self-defense claim. For a killing or other use of force “to be in self-defense, the defendant must actually and reasonably believe in the need to defend.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Defendant clearly placed her subjective intent in stabbing the victim at the center of this case by her testimony and theory of the case. And, as the court noted, evidence of a prior assault may be admitted in appropriate circumstances to disprove a claim of self-defense. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 9, 15; *People v. Simon* (1986) 184 Cal.App.3d 125, 129-130.)

We conclude the court was within its discretion under Evidence Code sections 351 and 1108 when it found the October 2006 stabbing incident to be relevant and admissible as evidence of defendant’s intent. The prior attack and the attack at issue in this case “were similar enough to make the earlier one relevant to the mental state with which defendant committed the later one. The least degree of similarity between the crimes is needed to prove intent.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1244 [applying “doctrine of chances” to uphold trial court’s evidentiary ruling allowing evidence of prior murder to show premeditation with regard to charged murder].) Defendant’s involvement in a prior incident —in which she allegedly stabbed someone while afterward claiming self-defense — has a bearing on the believability of her assertions of self-defense in the instant case.

We also reject the suggestion that the court abused its discretion under Evidence Code section 352. “The court in its discretion may exclude evidence if its

probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*Ibid.*) In cases involving uncharged misconduct, “[t]he probative value of the uncharged offense evidence must be substantial” (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) The court exercised its discretion to exclude evidence that the victim died in the prior incident and further excluded evidence that defendant stabbed a second individual in the earlier incident (although the defense brought this latter evidence into the record themselves). The court’s ruling demonstrates a carefully tailored approach to competing concerns between the probative value of the prior incident and the potential for undue prejudice. With regard to the evidence allowed into the record, the court was entitled to conclude the probative value was substantial and the probative value was not offset by the negative consequences set forth in Evidence Code section 352.

Refusal to Admit Evidence of Lack of Prosecution

Defendant next asserts that once the court allowed evidence of the prior incident to come into the record, the court was obligated to also allow defendant to testify she was never charged with a crime for the prior incident.

People v. Griffin (1967) 66 Cal.2d 459 “and its progeny . . . stand for the proposition (hereinafter the *Griffin* rule) that if a trial court permits the prosecution to present evidence that the defendant committed one or more similar offenses for which he or she is not charged in the current prosecution, the trial court must also allow the defense to present evidence of the defendant’s acquittal, if any, of such crimes, and failure to allow such acquittal evidence constitutes error.” (*People v. Mullens* (2004) 119 Cal.App.4th 648, 664-665.)

The *Griffin* rule applies equally to a circumstance in which the defendant seeks to establish he or she was *not prosecuted* (rather than prosecuted and acquitted) for

the alleged similar offense at issue. (*People v. Jenkins* (1970) 3 Cal.App.3d 529, 534-535 (*Jenkins*).) “In *Griffin* it was held that competent and otherwise admissible evidence of another crime is not made inadmissible by reason of the defendant’s acquittal of that crime [citations], but the proof of the acquittal was also admissible to *weaken and rebut the prosecution’s evidence of the other crime*. Accordingly, the gist of the holding in *Griffin* is that since ‘evidence of other crimes always involves the risk of serious prejudice, and it is therefore always “to be received with ‘extreme caution,’”’ [citation] any competent or otherwise admissible evidence tending to weaken and rebut the evidence of the other crime should be admissible.” (*Id.* at p. 534.) Likewise, evidence that an individual was not prosecuted for alleged criminal activity tends “to weaken or rebut the prosecution’s evidence” that the criminal activity occurred in the manner posited by the prosecution. (*Id.* at p. 535.)

The *Jenkins* trial court committed error by excluding evidence that a similar charge against one of the defendants (which had been introduced to prove intent and common plan) had not been prosecuted. (*Jenkins, supra*, 3 Cal.App.3d at pp. 533-535; see also *People v. Mendoza* (1974) 37 Cal.App.3d 717, 724 [lack of prosecution can be communicated through jury instruction rather than evidentiary submission; ““for reasons with which you are not to concern yourselves, there is no prosecution relating to the alleged 1969 acts””].) The court in this case similarly erred. The concerns identified by the court (e.g., who knows why the prosecutor did not charge defendant in the earlier case) go to the weight of the evidence, not admissibility. The prosecutor would have been free in closing argument to identify the logical shortcomings of any argument by defendant suggesting a lack of prosecution necessarily shows innocence. Alternatively, the prosecutor could have requested an instruction like that given to the jury in *People v. Mendoza, supra*, 37 Cal.App.4th at page 724, or tracked down admissible evidence identifying the reason for the lack of prosecution.

Harmless Error Analysis

The court's error, however, was not prejudicial to defendant because it is not reasonably probable the jury would have reached a different verdict had the court allowed defendant to testify that she had never been prosecuted for the prior stabbing incident. (*Jenkins, supra*, 3 Cal.App.3d at p. 535 [error was harmless]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195 [error in admitting evidence of prior crimes does not provide basis for reversal if such error was harmless].) The evidence strongly supported the jury's findings of guilt. Defendant's testimony alone proves most of the case against her, leaving only a somewhat implausible self-defense theory. The testimony of Gonzalez and Ventura-Meza, as well as the stipulated facts pertaining to the damage done to Gonzalez, removes any lingering doubt concerning defendant's claims of self-defense. Evidence pertaining to the October 2006 incident proved to be an afterthought for the prosecution. Defense counsel elicited more testimony about this incident than the prosecutor and raised the occurrence in closing argument without prompting by the prosecutor. Indeed, defendant tried to turn the October 2006 incident to her advantage as a justification as to why she was carrying a knife at all in 2007 and 2008.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.